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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

MATTHEW T. PRESTON,

Plaintiff,

v.

BNSF RAILWAY COMPANY, a Delaware  
corporation,

Defendant.

Case No.: CV08-3045-CL

**BNSF RAILWAY COMPANY'S  
OPPOSITION TO PLAINTIFF'S  
MOTION TO COMPEL RULE 34  
INSPECTION**

**INTRODUCTION**

BNSF has agreed to the inspection on its property under certain conditions, and plaintiff has agreed to all but one condition—the signing of liability releases by those who attend the inspection on behalf of plaintiff, including plaintiff. Pursuant to Federal Rules of Civil Procedure 34 and 26, BNSF requests that the court require those attending the inspection on behalf of plaintiff to provide the signed liability releases.

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## LEGAL AUTHORITIES

FRCP 34(a)(2) allows any party to serve on any other party a request “to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).” Subsection (b) of FRCP 34 states: “the request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.” Fed. R. Civ. P. 34(b).

The inspection of a party’s premises requires careful consideration. As the Fourth Circuit has noted, “entry upon a party’s premises may entail greater burdens and risks than mere production of documents.” *Belcher v. Bassett Furniture Indus., Inc.*, 588 F.2d 904, 908 (4th Cir.1978). Accordingly, the court may protect a party from undue burden or expense by requiring appropriate restrictions on the inspection. *Id.* In considering such restrictions, the court should balance the potential benefits of the inspection against the burdens and dangers created by the inspection. *Id.*

BNSF has not objected to plaintiff’s request to inspect the car and handbrake. However, as one court stated, “[r]isk of injury is a constant feature of railroads.” *Baugus v. CXS Transportation, Inc.*, 223 F.R.D. 469, 471 (N.D. Ohio 2004). Absent this inspection, BNSF would not have any risks or burdens with respect to the parties who will be coming onto its premises. Because plaintiff is requesting to inspect the

equipment upon the premises of BNSF, in all fairness, the risks involved with that activity should be born by plaintiff and his representatives, not BNSF.

Plaintiff cites case law from New York which did not require the parties to the inspection to sign a liability release. However, in Oregon, Multnomah County Judge Nely Johnson required plaintiff's representatives to sign such a release for an inspection at Union Pacific's Albina yard in Portland, Oregon, in the case of *Vann, et. al v. Union Pacific et. al.*, Mult. Co. Circuit Case No. 0404-03616. A true and correct copy of a letter to plaintiff's counsel attaching the release approved by the court is attached as Exhibit 1 to the Declaration of Glenn W. Robles, filed herewith.

This court should do the same in this case. The release does not impose any additional burdens upon plaintiff and his representatives and is reasonable in scope.

### **CONCLUSION**

For the reasons discussed herein, plaintiff's motion to compel should be denied.

DATED: October 3, 2008.

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